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SUPREME COURT OF THE UNITED STATES

No. 943 44 OCTOBER TERM, 1938

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

Application of Commerce Clause to consumers' sales tax on purchases in New York City of oil, filled by shipment from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that oil purchases made in city are in interstate commerce merely because seller for its own convenience chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing merchandise outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunities and fostering tax avoidance and evasion. Conflict between decisions of state courts.

May 3, 1939.

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INDEX

	PAGE
PETITION:	
Jurisdiction and timeliness	2
Statute the validity of which is involved	4
Opinions below	4
Summary statement of the matter involved	4
Questions presented	5
Assignment of errors	5
Reasons for allowance of writ	6
BRIEF:	
Statement of the case	9
Assignment of errors	12
Argument:	
1. The New York City sales tax, as applied to the respondent's sales, does not impose an unconstitutional burden on interstate commerce	13
There is no undue burden on interstate commerce	13
Comparable taxes have always been upheld	15
2. Respondent's sales do not require or necessarily involve interstate shipment, as that phrase is used in *Wiloil Corp.* v. *Pennsylvania*	18
Conclusion	20
Appendix A. Provisions of local law	22
Appendix B. Provisions of state enabling act	43
Appendix C. 1. Opinion of Court of Appeals in Compagnie Generale Transatlantique case	46
2. Opinion of Appellate Division in Compagnie Generale Transatlantique case	51
3. Memorandum opinion of Court of Appeals in Felt & Tarrant case	57
4. Opinion of Court of Appeals in Sears, Roebuck case	58

Table of Cases Cited

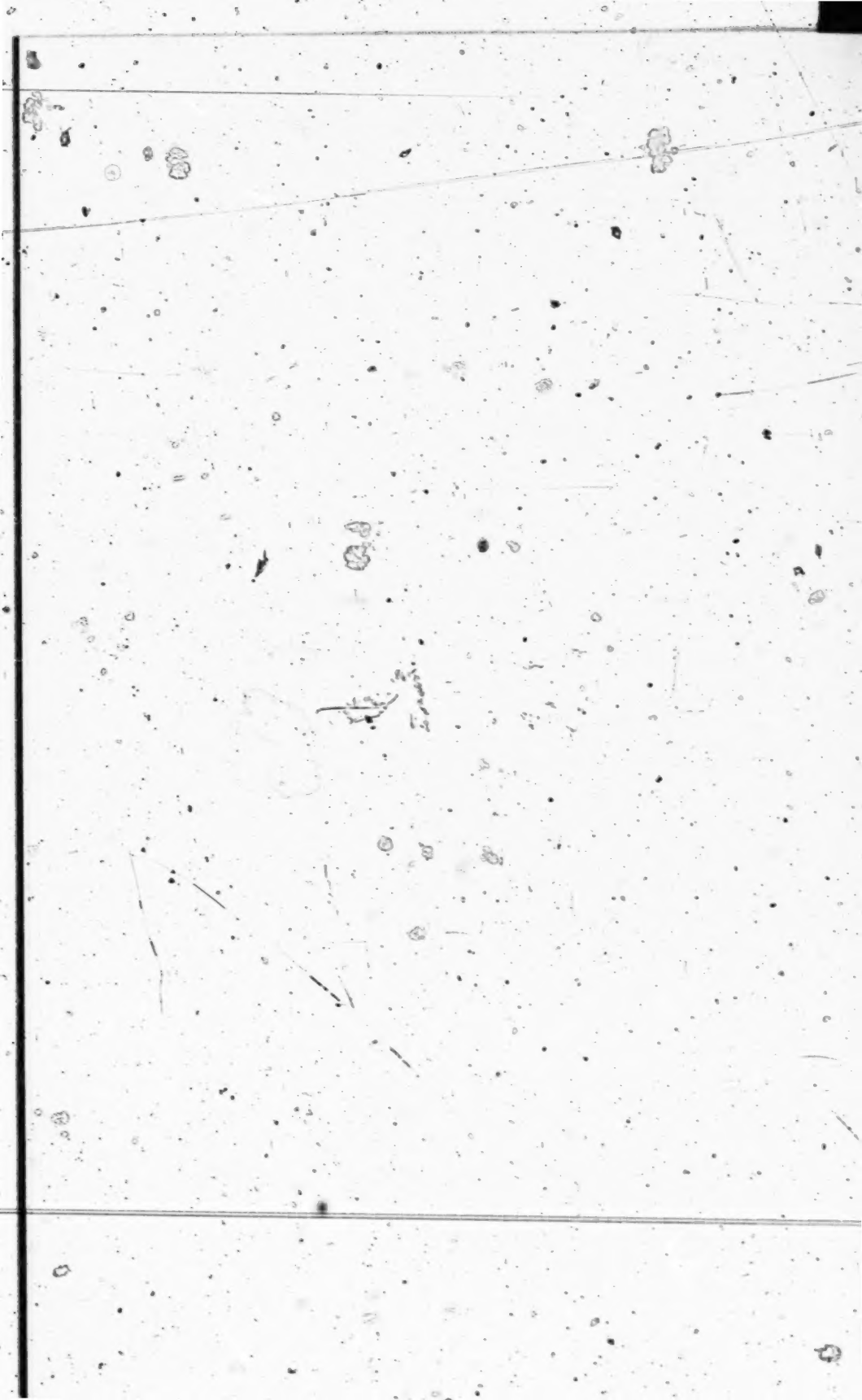
	PAGE
Ayer & Lord Co. *v.* Kentucky, 202 U. S. 63	56
Banker Brothers *v.* Pennsylvania, 222 U. S. 210	6, 16, 18, 56, 64
Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604	13, 64
Edelman *v.* Boeing Air Transportation Co., 289 U. S. 249	16, 51
Felt & Tarrant Mfg. Co. *v.* Gallagher, 305 U. S.	16, 17
Gregg Dyeing Co. *v.* Query, 286 U. S. 472	16
Gwin, White & Prince *v.* Henneford, 305 U. S. 434	13, 14
Henneford *v.* Silas Mason Co., 300 U. S. 577	16, 57, 64
Hinson *v.* Lott, 8 Wall. 148	14, 16
J. Bacon & Sons *v.* Martin, 305 U. S. 380	14, 16
J. D. Adams Mfg. Co. *v.* Storen, 304 U. S. 307	13, 14, 64
Lewis *v.* City of Bluefield, 117 W. Va. 782, 188 S. E. 237	7
Matter of C. G. Gunther's Sons *v.* McGoldrick, 279 N. Y. 148	12
Matter of Compagnie Generale Transatlantique, 279 N. Y. 192	4, 46
Matter of Felt & Tarrant Co. *v.* McGoldrick, 279 N. Y. 678	2, 4
Matter of McNeel Marble Co. *v.* Graves, 247 App. Div. 242	56
Matter of National Cash Register Co. *v.* Taylor, 276 N. Y. 208	56, 58, 63
Matter of Sears, Roebuck & Co. *v.* McGoldrick, 279 N. Y. 184	2, 4, 47, 49, 50
Matter of West Publishing Co. *v.* Taylor, 276 N. Y. 535	64
Milk Control Board *v.* Eisenberg Farm Products, 306 U. S. , 59 S. Ct. 528	2

PAGE

Minnesota *v.* Blasius, 290 U. S. 1 ..... 2, 56, 57
Monamotor Oil Co. *v.* Johnson, 292 U. S. 86 ..... 14, 16, 64
Moore *v.* N. Y. Cotton Exchange, 270 U. S. 593 20
Nashville, C. & St. L. Ry. *v.* Wallace, 288 U. S. 249 16
Pacific Telephone & Telegraph Co. *v.* Gallagher, 305 U. S. , 59 S. Ct. 396 16
People ex rel. Astor Trust Co. *v.* State Tax Commission, 174 App. Div. 320 56
Postal Telegraph Cable Co. *v.* City of Richmond, 249 U. S. 252 63
Southern Pacific Company *v.* Gallagher, 305 U. S. 59 S. Ct. 389 ..... 16, 18
Southern Pacific Co. *v.* Kentucky, 222 U. S. 63 56
Ware & Leland *v.* Mobile County, 209 U. S. 405 20
Western Live Stock *v.* Bureau, 303 U. S. 250 ..... 13, 16, 64
Western Union Tel. Co. *v.* Foster, 247 U. S. 105 55
Wiloil Corporation *v.* Pennsylvania, 294 U. S. 169 ..... 5, 6, 14, 16, 18, 51, 56, 64
Woodruff *v.* Parham, 8 Wall. 123 ..... 16, 19

Index of Statutes, etc.

Civil Practice Act, Art. 78 ..... 3, 46, 51
Comptroller's Regulations, Art. 94 12
Laws of California of 1935 17
Laws of California of 1937 17
Laws of New York of 1934, ch. 873 ..... 4, 43, 59
Local Law No. 20 of 1934 ..... 3, 4, 46, 52, 53, 58
Local Law No. 24 of 1934 ..... 4, 22, 46, 52, 55, 57, 58, 59
Local Law No. 25 of 1934 ..... 52, 53
Local Law No. 13 of 1935 52
Local Law No. 23 of 1935 4
U.S.C.A., Title 28, §344, subd. (b) 2, 8
U. S. Constitution, Commerce Clause 2, 3, 6, 7, 20



SUPREME COURT OF THE UNITED STATES

No. . OCTOBER TERM, 1938

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

Petition for Writ of Certiorari to Supreme Court of the State of New York

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved. In conformity with the law of New York, your petitioner was duly substituted prior to the decision of the Court of Appeals sought to be reviewed, in place and stead of Frank J. Taylor, the former Comptroller, who made the original determination of tax liability against the taxpayer. The petition seeks review of a decision of the Court of Appeals of the State of New York (Judge FINCH dissenting), holding that, by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondent's purchases of fuel oil. The federal question was, and the Court so stated, the sole question involved in its decision.

2. The present case is a companion case to *Matter of Felt & Tarrant Mfg. Co.* v. *McGoldrick*, 279 N. Y. 678, decided on the same date, where the tax was likewise invalidated. A petition for certiorari in that case is being presented together with the present petition. On the same date was also decided *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, rearg. den. 280 N. Y. mem. p. 76, in which case, however, the tax was upheld as not violative of the Commerce Clause.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U.S.C.A., §344, subd. (b); the Court has jurisdiction to grant the writ. *Minnesota* v. *Blasius*, 290 U. S. 1 (1933); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. , 59 S. Ct. 528 (1939).

4. A final order and judgment were entered in the office of the County Clerk of New York County, on December 17, 1938, upon the remittitur of the Court of Appeals filed on December 9, 1938, and upon the order of the Supreme Court of the State of New York, dated December 9, 1938, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice STONE, dated February 11, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of sixty days from February 27, 1939; and, by order of Mr. Justice STONE, dated April 19, 1939, such time was again extended for a period of sixty days from March 15, 1939, which latter date was within three months of the original entry of the final order and judgment on December 17, 1938. On April 3,

1939, petitioner duly filed with the Court of Appeals a motion for reargument and to amend the remittitur. On April 11, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend. On April 26, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated April 11, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice STONE's orders of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on April 11, 1939, and the resultant necessity of entering new orders in the Court where the record lies.

5. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection to the tax was raised by the taxpayer (respondent here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 297-298). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 12). The Appellate Division sustained the objection and annulled petitioner's determination (R. 386-392). Upon further appeal to the Court of Appeals, it was the sole objection urged by the taxpayer in the Court of Appeals. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States." (280 N. Y. mem. p. .)

The Statute the Validity of Which Is Involved

6. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of Local Laws of the Cities of the State for 1934 as No. 21), as amended by Local Law No. 24 of 1934 (officially printed at p. 164 as No. 25), and by Local Law No. 23 of 1935 (p. 138), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local law are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below

7. The opinions of the Court of Appeals are reported in 279 N. Y. 192, the opinion of the Appellate Division in 254 App. Div. 237. The memorandum opinion of the Court of Appeals in the companion *Felt & Tarrant Mfg. Co.* case is in 279 N. Y. 678, which affirmed 254 App. Div. 246. The opinion of the Court of Appeals in *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, decided on the same day but sustaining the tax, is reported in 279 N. Y. 184, the memorandum opinion of the Appellate Division in 254 App. Div. 669. Copies of the opinions of the Court of Appeals in the three cases and of the Appellate Division in this case are attached hereto as Appendix C.

Summary Statement of the Matter Involved

8. The City sales tax law in question imposes a nondiscriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being

paid and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as, a sale "for any purpose other than for resale". The respondent's purchases which were the subject of the tax were made pursuant to contracts and in a manner described more fully in the subjoined brief. The contracts were entered into in New York City and called for the sale and delivery in New York City of standard fuel oil of a kind which the seller was at liberty to obtain either from a supply in New York City or by shipment from storage tanks maintained by it across the Hudson River opposite New York City, the contracts containing no provision requiring the oil to come from New Jersey or anywhere else.

Questions Presented

9. The questions presented in the case are as follows:

   (a) Does the New York City tax as applied to respondent's purchases of fuel oil impose an unconstitutional burden on interstate commerce?

   (b) Do respondent's purchases of fuel oil "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174 (1935)?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

   (a) In holding that the New York City sales tax as applied to the respondent's purchases constituted an unconstitutional burden on interstate commerce.

(b) In holding that the purchases which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra*.

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioner for allowance of the writ are as follows:

(*a*) Petitioner contends that in holding that the City sales tax law as applied to respondent's purchases of fuel oil constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (*i*) does not discriminate against or otherwise burden interstate commerce, and (*ii*) is so limited in its operation that there is no possibility of multiple taxation.

(*b*) Petitioner suggests that in holding that the particular transactions taxed required or necessarily involved interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court: *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911).

(*c*) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(*d*) The decision of the Court of Appeals unduly limits the taxing power of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenues from other taxes.

The Commerce Clause should not be twisted into a device calculated to prejudice local vendors by subjecting them to unjustifiable competitive disadvantages in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(*e*) The decision of the Court of Appeals that respondent's purchases taxed are in interstate commerce, conflicts with the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court,

directed to the Supreme Court of the State of New York, in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U.S.C.A., §344, subd. (b); and that the final order and judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and judgment may be reversed and petitioner's original determination of tax liability on the part of the respondent confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., May 3, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

By SOL CHARLES LEVINE,
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SUPREME COURT OF THE UNITED STATES

No. . October Term, 1938

Joseph D. McGoldrick, Comptroller of the City of New York,
Petitioner,
against
Compagnie Generale Transatlantique.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent steamship company, upon which the tax was imposed as purchaser, maintains physical pier properties and offices at the foot of West 50th Street, New York City. It also maintains places of business at 19 State Street and 610 Fifth Avenue, New York City. The latter comprise its freight, passenger, operating, publicity, accounting, executive and purchasing offices (R. 93-94). The Standard Oil Company of New Jersey from which respondent made the purchases of fuel oil involved in this case, maintains offices at 26 Broadway and in Rockefeller Center, and storage tanks and other facilities at Bayonne and Bayway, New Jersey (R. 169, 179, 261).

The bunker "C" fuel oil purchased by respondent from its vendor is a standard kind of oil (R. 203, 280-282).

It is procurable on the open market at an "open market price" (R. 311). It has no special quality not shared by the oils of other vendor companies (R. 203, 280-282). Any bunker "C" fuel oil becomes "Standard" oil merely if the Standard Oil Company chooses to buy and sell it (R. 280, 282).

The same kind of oil was actually furnished by the Standard Oil Company to the respondent from the supplies of other oil companies, including the Shell Oil Company, the Mexican Petroleum Company, the Tidewater Oil Company and the Gulf Oil Company (R. 203, 280-281, 284-285, 293, 852-853, 855, 877-878). On those occasions there was a representation by the Standard Oil Company that the oil so furnished was Standard bunker "C" fuel oil (R. 281-283, 285), and the Standard Oil Company did not even bother to mention that it was supplying the fuel oil from sources other than its own tanks (R. 202, 220-221, 239). The oil so delivered met all the specifications of the orders (R. 224-225, 281-282, 282-283).

Included in the oil furnished to the respondent by the Standard Oil Company was oil of the Gulf Oil Company drawn from the latter's storage tanks in New York City (R. 199, 210, 285).

The long-term requirement contracts pursuant to which the respondent obtains its oil from the Standard Oil Company are embodied in a series of letters over the period from 1927 to 1933 (Taxpayer's Exhibits 1-13, R. 299-319), and a Diesel oil agreement dated January 23, 1935 (Taxpayer's Exhibit 14, R. 320). The contracts, which are between the French Line, 19 State Street, New York City, and the Standard Oil Company, 26 Broadway, New York City (R. 299, 309, 311), were all negotiated and signed in the City of New York (R. 102, 106, 132, 140).

Neither the letters nor the agreement contain any provision requiring the oil to come from New Jersey or from anywhere else. No mention is made in them of a shipping point, the oil being sold merely "delivered" (R. 299, 301-305, 311, 317). Respondent is never notified, nor does it ever ascertain, where shipment is to be made from or where it is actually made from (R. 202, 220). So far as the use of the oil is concerned, the source of supply makes no difference whatever (R. 156, 158, 245).

The specific purchases here involved are made in the following manner: Respondent's New York City office telephones the office of the Standard Oil Company at 26 Broadway and places the order (R. 172, 174-175, 231). The respondent's employee states to the Standard Oil Company's employee merely the quantity of oil to be delivered and the time and place; he makes no mention of the source of shipment (R. 175).

The Standard Oil Company's Broadway office thereupon communicates with its storage plants in New Jersey, or some other available source of supply which it selects (R. 203, 280-281, 284-285). The oil is then delivered by barge to the respondent's ship at its New York City pier (R. 142, 426). As long as respondent gets what is ordered, it is a matter of indifference to it where the oil comes from (R. 224-225, 281-282, 282-283). All deliveries taxed, without exception, were made at respondent's New York City pier (R. 142). All invoicing and payment is accomplished in New York City (Taxpayer's Exhibits 32-A, 32-B, 33-A, 34-A, 34-B, R. 360-365).

The ease with which the tax can be evaded merely by setting up a source of supply across the Hudson River opposite New York City, is a matter well known to persons selling merchandise in New York City.

The City sales tax imposed upon these purchases is a general non-discriminatory tax of 2% upon every "transfer of title or possession or both", in the City of New York, of tangible personal property purchased for consumption and not for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner, as City Comptroller. In the present proceeding, the tax was imposed directly upon respondent as purchaser. As a matter of state law, the tax does not apply where goods, although purchased in New York City, are to be delivered to consumers outside the City. Article 94 of the Comptroller's Regulations; *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Assignment of Errors

The Court will find our Assignment of Errors at page 5 of the petition, *supra*.

Jurisdiction

The Court is referred to the jurisdictional statement at page 2 of the petition, *supra*.

POINT I

The New York City sales tax, as applied to the respondent's purchases, does not impose an unconstitutional burden on interstate commerce.

The question is whether the tax as applied to respondent's purchases imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is nondiscriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local busi-

ness would be discriminated against were the tax at bar to be held invalid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchases of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumer's taxes imposed by the buyer's state, viz.: a motor fuel (sales) tax (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1933]), a use (sales) tax (*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 [1934]), a "receiving" (sales) tax (*J. Bacon & Sons* v. *Martin*, 305 U. S. 380 [1939]), or a property (sales) tax (*Hinson* v. *Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 [1938]); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed by the *purchaser's* State and the tax could not be imposed on the same sales by the *seller's* State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be

administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City taxes New York City purchasers on their purchases in that City, and New Jersey taxes New Jersey purchasers on their purchases there. New Jersey could not claim the right to tax respondent on its acquisition of property in New York City, any more than New York City could tax a New Jersey purchaser on his acquisition of property in New Jersey. The doctrine of extraterritoriality as well as that of multiple taxation would forbid such a result.

4. Unless the tax at bar is sustained, foreign vendors will obtain unjustifiable advantages over local competitors who are required to collect the 2% tax. Business will be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion will be fostered. There is no sound reason why respondent should be permitted to escape the sales tax merely because it buys its oil from the Standard Oil Company with its tanks across the Hudson River in New Jersey, rather than from the Gulf Oil Company with its tanks in New York City.

Comparable taxes have always been upheld.

So far as we are aware, this is the first case presented to this Court in which a purchaser-consumer has complained that a retail sales tax levied upon him imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See, in this connection, the scholarly analysis of the cases in LOCKHART, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 376 (January 30, 1939); *Southern Pacific Company* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 389 (January 30, 1939); *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 396 (January 30, 1939); *J. Bacon & Sons* v. *Martin*, 305 U. S. 380 (January 3, 1939); *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co.* v. *Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911); *Woodruff* v. *Parham*, 8 Wall. 123 (1868); *Hinson* v. *Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In almost all, the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra,* as the following tabular comparison plainly shows:

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
6. The tax law requires the vendor to insure payment of the tax if it fails to make the collections from the tax debtors.	6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.
7. The tax is on a local event, *i.e.*, "the exercise of any right or power * * * incident to the ownership of that property" other than resale.	7. The tax is on a local event, *i.e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see, paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify varying constitutional treatment. As stated by this Court in *Southern Pacific Company v. Gallagher, supra,* 305 U. S. , 59 Sup. Ct. 389, 394:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed". (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II

Respondent's purchases do not "require or necessarily involve interstate shipment", as that phrase is used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174.

The Court of Appeals held that respondent's purchases required or necessarily involved interstate commerce as that phrase is used in the *Wiloil* case. We submit that in so holding, the Court misapprehended not only that case but also *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210 (1911).

In the *Wiloil* case, *supra,* as in the case at bar, the sale was made in the buyer's State, called for delivery of

the merchandise in that jurisdiction, and related to unascertained goods, viz., fuel oil. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

> "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham*, 8 Wall. 123, 137. *The limitation appellant puts on §4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation

been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience or economy) from outside the State, be exempted from a general consumer's sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the *res* to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondent obtains the protection of the laws of New York for its purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., May 3, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner.

EDMUND B. HENNEFELD,
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JEROME R. HELLERSTEIN,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24

A Local Law to Amend Local Law Number Twenty of the Year Nineteen Hundred and Thirty-four to Relieve the People of the City of New York from the Hardships and Suffering Caused by Unemployment and the Effects Thereof on the Public Health and Welfare, by Imposing a Tax Upon Receipts from Sales of Certain Properties and Rendering of Certain Services in the City of New York, to Enable Such City to Defray the Cost of Granting Unemployment Work and Home Relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled: "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

Appendix A

Tax on sales of certain properties and rendering of certain services in the city of New York:

Section 1. Definitions.
2. Imposition of tax.
3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

§ 1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

Appendix A

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises;

Appendix A

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;
Sugar and sugar products, other than candy and confectionery;
Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;
Water, when delivered to the consumer through mains and pipes;
Drugs and medicines sold upon a physician's prescription;
Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or

otherwise without power to impose a tax shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after Decem-

ber tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five, such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

Appendix A

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. Collection of tax from purchaser. The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. Records to kept. Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. Returns. Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. Payment of taxes. At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any

vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. Determination of tax by comptroller. If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for

a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. Proceeding to recover tax. Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy

upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued, and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comp-

troller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. Notices and limitations of time. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller

if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. General powers of the comptroller. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any

person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. Administration of oaths and compelling testimony. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any mate-

rial matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. Reference to tax. Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sale issued or employed by the vendor the word "tax" will suffice.

§ 14. Registration. On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of registration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a (certificate of authority empowering such vendor to collect the tax from the purchaser) and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be

prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. Penalties. Any person failing to file a return or to pay or pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable,

may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form oth than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or

that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. Returns to be secret. 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set

aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. Disposition of revenues. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. Application; construction. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter

eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

Sec. 2. Effective date of local law. This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisic of State Enabling Act

LAW OF NEW YORK

CHAPTER 873

An Act to Enable, Temporarily, Any City of the State Having a Population of One Million Inhabitants or More to Adopt and Amend Local Laws, Imposing in Any Such City Any Tax and/or Taxes Which the Legislature Has or Would Have Power and Authority to Impose to Relieve the People of Any Such City from the Hardships and Suffering Caused by Unemployment and to Limit the Application of Such Local Laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nine-

teen hundred thirty-five, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C

1. Opinion of the Court of Appeals in *Compagnie Generale Transatlantique* Case

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent, against JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Appellant.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1938, in a proceeding under article 78 of the Civil Practice Act, in so far as such order annuls a determination of the Comptroller of the City of New York assessing a sales tax deficiency against the petitioner for the period from December 10, 1934, to December 31, 1935, under New York City Local Law No. 20 (published as No. 21) of 1934, as amended by Local Law No. 24 (published as No. 25) of 1934. The assessment in question was against the petitioner, as the purchaser of fuel oil from the Standard Oil Company, which maintained plants or storage tanks in the State of New Jersey. The order of the Appellate Division stated that the determination of the Comptroller with respect to deliveries originating in New Jersey should be annulled and in other respects confirmed; and also directed that the defendant return to the petitioner the amount (less a stated sum) of such deficiency sales tax which had previously been deposited, under protest, with the Comptroller by petitioner. The sum not ordered returned represented the amount of tax which was conceded to be payable on certain deliveries of fuel oil supplied from localities within the City of New York. As

to such part of the assessed tax the determination of the Comptroller was confirmed.

William C. Chanler, Corporation Counsel (Sol Charles Levine, Edmund B. Hennefeld and *Jerome R. Hellerstein* of counsel), for appellant.

Herbert K. Stockton for respondent.

H. Maurice Fridlund and *James R. Roberts for Kirlin, Campbell, Hickox, Keating & McGrann, amici curiae.*

CRANE, CH. J.:

This appeal involves the same question as that presented in its companion case, *Matter of Sears, Roebuck & Co.* v. *McGoldrick* (279 N. Y., 184). Should the principles there stated lead to a different result on the facts in this case?

The Standard Oil Company, having numerous oil tanks in New Jersey, by New York contract sold and delivered oil to the respondent's steamships at its piers in New York City. A tax upon these sales for the period from December 10, 1934 to December 31, 1935, has been set aside below, as an illegal burden upon interstate commerce. The only distinction upon the facts in this case and those in the *Sears, Roebuck & Co.* case rests in the nature of the respondent's business. The respondent buys two classes of oil for steamships—fuel oil, and Diesel fuel oil. In the briefs these are referred to as "Standard Bunker Fuel Oil" and "Standard Diesel Fuel Oil." The

storage tanks containing large quantities of these oils are at Bayonne, New Jersey.

The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made by barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the *Normandie* or the *Paris* or the *Champlain* or the *Lafayette* approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of

the oil company would soon be alongside prepared to pump the oil into the steamer's tanks. The oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

Unless there be some material difference between the sales in this case and those in the *Sears, Roebuck* case, we shall be obliged to sustain the tax. What difference do we find? In the first place, the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey and the vicinity. The steamship company knew that the nature of the business required oil to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the Port of New York. While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the Port of New York increased the price.

Appendix C

In the *Sears, Roebuck* case the purchaser bought an article in New York according to sample. As long as he got what he ordered, it was indifferent to him where it came from. The merchandise was very largely stock goods and kept for the convenience of the seller at various depots throughout the State. The ease with which the tax could be evaded by such class of merchandise being stored without the State and sold in New York City by sample was a matter worthy of consideration, as bearing upon competition with New York goods.

Here, on the other hand, there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the principles stated in the *Sears, Roebuck* case and the authorities there cited, that this is a contract for interstate shipments, and that the tax upon such a sale is a direct tax upon interstate commerce.

The order should be affirmed with costs.

FINCH, J. (Dissenting). The contract involved in the case at bar admittedly was made in New York for delivery in New York of a standard kind of oil procurable in the open market in New York or elsewhere, at an open market price. While customarily coming from New Jersey, it is admitted that in some instances the seller has resold oil which, pursuant to its rights under the contract, it had purchased in New York. When sold and delivered in this State, the fact that it may be used thereafter in foreign

commerce does not prevent it from being taxable as a sale here (*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249). In addition, since no burden is laid on interstate commerce as such, and no other or different burden than if deliveries had been made by intrastate transportation in New York, the tax is a non-discriminatory one and cannot in any view constitute an undue burden on interstate commerce (*Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169).

The order appealed from should be reversed and the determination of the Comptroller reinstated.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN and RIPPEY, JJ., concur with CRANE, Ch. J.; FINCH, J., dissents in opinion.

Order affirmed.

2. Opinion of Appellate Division in *Compagnie Generale Transatlantique* Case

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, for an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.

CERTIORARI REVIEW under article 78 of the Civil Practice Act pursuant to order granted out of the New York Special Term of the Supreme Court on the 29th day of December, 1937, and directed to Frank J. Taylor (now Joseph D. McGoldrick), as comptroller of the city of New York, commanding him to certify and return to the Appellate Division, First Department, all and singular his proceedings had and determinations made in assessing

a tax against the petitioner, pursuant to Local Law No. 20 (published as No. 21) of the New York City Local Laws of 1934, as amended by Local Law No. 24 (published as No. 25) of the New York City Local Laws of 1934, known as the New York City Retail Sales Tax Law, and pursuant to Local Law No. 25 (published as No. 26) of the New York City Local Laws of 1934, as amended by Local Law No. 13 of the New York City Local Laws of 1935, known as the New York City Personal Property Tax Law.

The assessment and determination made under the New York City Personal Property Tax Law was brought into the proceedings pursuant to stipulation of the parties.

Herbert K. Stockton of counsel [*Bernard D. Atwood* with him on the brief; *Haight, Griffin, Deming & Gardner,* attorneys], for the petitioner.

Robert Granville Burke of counsel [*Oscar S. Cox, Frank J. Derrick* and *Sol Charles Levine* with him on the brief; *William C. Chanler, Corporation Counsel,* attorney], for the respondent.

H. Maurice Fridlund of counsel [*Cletus Keating* and *James R. Roberts* with him on the brief; *Kirlin, Campbell, Hickox, Keating & McGrann,* attorneys], as *amici curiæ.*

George deForest Lord of counsel [*Woodson D. Scott* with him on the brief; *Lord, Day & Lord,* attorneys], for the Cunard White Star, Limited, *amicus curiæ.*

Harold L. Warner of counsel [*George D. Yeomans,* attorney], for the Williamsburgh Power Plant Corporation, *amicus curiæ.*

O'Malley, J. This proceeding to review a determination of the comptroller of the city of New York, assessing a deficiency tax against the petitioner in the sum of

$26,955.70, presents generally the questions, (1) whether sales to the petitioner by the Standard Oil Company of New Jersey of certain bunker fuel and Diesel oil were taxable under Local Law No. 20 of 1934 (New York City Sales Tax Law); and if not, (2) whether they were taxable under the provisions of Local Law No. 25 of 1934 (New York City Personal Property Tax Law).

The petitioner, more commonly known as the French Line, is a French corporation, engaged in the transportation of passengers and freight between the United States and foreign countries. It is authorized to do business in this State, and maintains in New York city a general agency for the United States and Canada for the sale of steamship tickets, the soliciting of freight, the operation of its piers, and the purchasing of supplies for its vessels.

The Standard Oil Company of New Jersey is a Delaware corporation. It, too, has offices in New York. Part of its business is the sale of bunker fuel and Diesel fuel oil. It has no storage tanks or other supplies located in New York city. It maintains at Bayonne, N. J., a large storage, refining and shipping plant. Another plant is at Bayway, N. J.

Bonded Standard bunker "C" fuel oil is refined oil stored in the tanks of the Standard Oil Company, free from the payment of any import duty to the United States, at all times under the supervision of the customs service. A bond to insure payment to the United States of any import duty which would become due if the oil should be used for domestic purposes is required. When delivered to a foreign steamship, a release from the bond is granted.

Appendix C

"Drawback" oil is oil imported from South America and refined at Bayonne or Bayway, N. J., at the plants of the Standard Oil. An import duty is paid thereon, but upon exportation or delivery to foreign steamships, a refund of such duties is made. Save for a few deliveries originating at Staten Island, all deliveries were of oil of these types.

For many years prior to the enactment of the local laws in question, the Standard Oil had agreements with the petitioner for the furnishing of this fuel and Diesel oil to the vessels of the petitioner at their piers in New York city. As certain vessels with a limited draft could dock at Bayonne and there receive the oil, there was a five-cent differential placed on oil delivered in Bayonne or in New York city. It does not appear, however, that any deliveries were ever made to the petitioner in New Jersey.

As refueling of the petitioner's vessels in this city was required to be very expeditious, because of a quick "turn-around," the following procedure was adopted between the petitioner and the Standard Oil. The incoming liner, about forty-eight hours before arrival at the Port of New York, would radio an estimate of the bunker requirements to the petitioner's New York office. Thereupon the petitioner's employee would telephone the Standard Oil shipping clerk in New York city and place the order. It was so timed that the barges on which the oil was transported from New Jersey to the vessel would arrive ten or fifteen minutes after the vessel had completed docking. Thereupon the oil was pumped directly from the barges into the fuel bunkers.

While the contracts between these parties did not specifically require that this oil should come from New Jersey or any other specified locality, the fact is, as already noted, that the only sources of supply for oil of this character in this vicinity controlled by the Standard Oil were its plants in Bayonne and Bayway, N. J. Furthermore, the petitioner knew that this would be the immediate source of the fuel oil and, of course, the petitioner had the right, specifically granted in the contracts, to fuel its vessels at Bayonne, were they of sufficiently shallow draught. Moreover, the contracts required delivery to the steamer.

Certain small deliveries in emergency periods were made by oil borrowed by the Standard from competitors, and two of such deliveries had their origin at Staten Island in New York city, where the competing firm had its oil.

We are of opinion that, with respect at least to the New Jersey originating deliveries mentioned, there could be assessed and collected no tax under the City Sales Tax Law.

As to those shipments originating in New Jersey, they were interstate transactions, and hence not taxable by the State of New York. The city, deriving its power from the State, could have no greater right. Delivery from New Jersey was the "normal, contemplated and followed course" of dealing. (*Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113.)

There was here no ending of the interstate transaction, nor had the oil come to rest in this jurisdiction so as to acquire a situs herein. There was no break in transit.

Under such circumstances there was an entire and exclusive interstate transaction. (*Minnesota* v. *Blasius*, 290 U. S. 1.)

The oil was immediately, as already stated, pumped from the lighters into the bunkers of the ship and thereupon became a part of the ship. The vessels themselves had no taxable situs here. (*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63; *Ayer & Lord Co.* v. *Kentucky*, 202 id. 409; *People ex rel. Astor Trust Co.* v. *State Tax Commission*, 174 App. Div. 320, 324.)

The situation here is, we think, factually dissimilar from *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169); *Banker Brothers* v. *Pennsylvania* (222 id. 210), and *Matter of McNeel Marble Co.* v. *Graves* (247 App. Div. 242). In the *Wiloil* case the Supreme Court of the United States held itself bound by the finding of the Pennsylvania courts that the goods had come to rest in Pennsylvania before the sale to a resident of Pennsylvania. Here, the shipments in question never came to rest within this jurisdiction. In the *Banker Brothers* case the article which was the subject of sale had likewise been held to have come to rest in the taxing jurisdiction. This also was true in the *McNeel Marble* case. These particular shipments seem, therefore, to fall within the purview of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208; certiorari denied, 303 U. S.—), where it was held that the city sales tax had no application.

As to the emergency deliveries originating at Staten Island, the petitioner concedes for the purpose of this case only that the sales tax of $292.83 should apply. Because of this concession the determination under review with respect to such amount of tax will be confirmed. By such

confirmation, however, we are expressing no opinion respecting the taxability of such sales.

Finding, as we do, that the New Jersey shipments never came to rest and acquired no situs in this State and that the interstate or foreign commerce was uninterrupted and continuous, the New York City Personal Property Tax Law also did not apply. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582; *Minnesota* v. *Blasius*, *supra*, p. 10.)

As to the alleged invalidity of this law and the other objections raised thereto by the petitioner, we do not in this decision consider or decide. The city states in its brief that it does not "press its right in this proceeding" in this respect.

It follows, therefore, that the determination of the comptroller with respect to the deliveries originating in New Jersey should be annulled; otherwise, confirmed as herein indicated.

MARTIN, P.J., GLENNON, UNTERMYER and DORE, JJ., concur.

Determination of the respondent with respect to the deliveries originating in New Jersey unanimously annulled; otherwise, confirmed as indicated in opinion. Settle order on notice.

3. Memorandum Opinion of Court of Appeals in *Felt & Tarrant* Case

In the Matter of FELT & TARRANT MFG. CO., Respondent, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Appellant.

Appendix C

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1938, which annulled a determination of the Comptroller of the City of New York assessing against petitioner a sales tax pursuant to Local Law No. 20 of 1934 (published as No. 21), as amended by Local Law No. 24 (published as No. 25).

William C. Chanler, Corporation Counsel (*Milton Sandberg* and *Bernard H. Sherris* of counsel) for appellant.

Newton K. Fox, for respondent.

Order affirmed with costs, upon the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). No opinion.

CONCUR: CRANE CH.J., LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ.

4. Opinion of Court of Appeals in *Sears, Roebuck* Case

In the Matter of SEARS, ROEBUCK & Co., Appellant, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 29, 1938, which confirmed a determination of the Comptroller of the City of New York assessing a deficiency sales tax, with interest and penalties, against the petitioner for the period from December 10, 1934, to December 31, 1935, under Local Law No. 20 of 1934

(published as No. 21), as amended by Local Law No. 24 (published as No. 25) for the City of New York.

Robert D. Steefel, Sol M. Stroock, Peter I. B. Lavan and *Bernard E. Brandes* for appellant.

William C. Chanler, Corporation Counsel (Sol Charles Levine, Edmund B. Hennefeld, Jerome R. Hellerstein and *Milton Sandberg* of counsel), for respondent.

CRANE, CH. J.

By Local Law No. 24 (published as No. 25) of 1934, enacted pursuant to authorization granted by the State Legislature (Laws of 1934, ch. 873), the city of New York imposes a tax of two percent upon receipts from every sale of tangible personal property sold within the city. The tax must be paid by the purchaser to the vendor, who is required to keep records and make a return to the Comptroller of his receipts and of the tax payable thereon. A sale is defined as any transfer of title or possession, or both, for a consideration. A sale at retail is a sale for any purpose other than for resale. Although ordinarily the tax is collected by the vendor from the purchaser, the Comptroller may collect the tax directly from the purchaser. Where the vendor fails to collect the tax the purchaser is required to file a return and pay the tax directly to the Comptroller.

Sears, Roebuck & Co. has been required to pay a tax for the years 1934 and 1935 upon sales made at its stores in New York City, the goods or merchandise being sent from its warehouses or plants in other States. Payment has been resisted under the plea that such a tax is uncon-

stitutional, as a burden upon interstate commerce. This tax has been sustained by the Appellate Division.

The petitioner conducts and operates nine retail stores within the city of New York. The principal office of the petitioner, which is a New York corporation, is at Chicago, Illinois. It has no factory or warehouse in the city of New York except a piano factory and except one warehouse in the borough of Brooklyn, which stores ready to wear suits, dresses, coats and other articles of clothing, piece goods, notions and other light merchandise. Sears, Roebuck & Co. maintains a control store at Philadelphia, Pennsylvania, which is a distributing plant for all of the New York stores and other stores in various parts of the east of the United States, and the executives at this control store have charge of and supervision over the New York stores. The company also maintains a factory at Port Newark, New Jersey, where there are manufactured and assembled bulky articles, such as mill work, roofer materials, heating equipment and the like. The articles involved on this review are described as "ship direct orders." Certain articles which are large and bulky, or which must be assembled and put together before they are ready for delivery to the customer, are not kept in stock in the company's New York stores, but are kept either at the control store in Philadelphia, or are kept or manufactured upon order, at the factory at Port Newark, New Jersey. At Boston, Massachusetts, there is the Boston mail order control store.

The regional auditor gave the following testimony:

"Q. When you make a sale or take an order for this type of merchandise do you have samples at

your store? A. There are samples on display in the store and that is all that is in the store; because of the type of merchandise, it is entirely too bulky to carry it in the stores."

The practice, so the petitioner stated in its petition for review, is for a customer to come to one of the retail stores in New York City and order the merchandise in question. He is informed by the salesman that the merchandise is not kept in stock, but must be ordered from either Philadelphia or Port Newark, as the case may be. His order is taken and if it is a cash transaction, he pays his money, or, if it is a credit transaction, his credit is checked. A sales slip is made out, which states that the merchandise is to be shipped either from the Philadelphia control store or Port Newark direct to the customer at his home within the city of New York. A duplicate of the sales slip is sent to Port Newark or Philadelphia. The order is filled and is shipped by United States mail or by common carrier. The sample of sales slip, taxpayer's Exhibit No. 6, for horsehide coat, size 48, simply has written diagonally across the bottom in lead pencil, "Ship from Phila control Stores." These sales slips are not signed by the purchaser.

Approximately eighty-five per cent of the sales at New York city stores are filled from a stock of merchandise kept in New York City. As to the remaining fifteen per cent, the goods are standard merchandise regularly carried in stock by the company as a retail dealer, none of which is manufactured to order, with the exception of mill work. At the nine retail stores during the period in question the appellant sold $2,750,857.99 worth of goods.

Of these sales, $2,228,113.59 represented orders filled from stock kept in New York city stores or in the warehouse maintained in Brooklyn. The balance of $462,744.40 consisted of sales filled from stock held in warehouses maintained in Philadelphia, Port Newark or Boston.

The two percent tax on the sales of merchandise in the stores in New York City has been paid. This appeal involves solely the tax on the "shipped direct orders." All parties to the controversy concede that the contracts of sale or the sales were made in New York City. The delivery was made from the company's warehouse or control stores according to shipping directions directly to the purchaser's home.

When the purchaser entered one of the defendant's stores and made a contract to buy certain merchandise, according to the sample displayed, his purpose and object were to procure the article, irrespective of the place from which it was delivered. It made no difference to him whether it came from Philadelphia, Port Newark or Boston, as long as he got it on time and in good condition. The delivery from the warehouses of the appellant outside the State was a matter of convenience or economy in the methods of conducting the appellant's business. It cannot be said that the shipments out of the State were one of the important features of the contract. It was incidental to the contract, the obligation of the defendant being to deliver the article purchased. From where it should come was a matter of its choice.

On these facts, has interstate commerce been burdened or interfered with in such a way as to make this city tax upon the proceeds of these "shipped direct orders" unconstitutional? In the first place, Sears, Roebuck & Co.

paid no more tax on these articles which it had delivered from its stores in Philadelphia or Port Newark or Boston than it paid on the goods sold and delivered from its nine stores in New York City. It paid no more tax than a seller would have paid or, to be more exact, a purchaser would have paid, if the goods had been purchased and delivered in New York City from any other vendor. There was here no discrimination against the interstate commerce or the shipment of goods from out the State. Neither could there possibly be any double taxation involved. The sale was complete in New York city; the price was to be paid in New York city; in every respect it was a New York State contract, governed by the laws of this State. The delivery of standard stock goods for the convenience of the seller was made from warehouses or storeplaces outside of the State. Under such circumstances, to permit Sears, Roebuck & Co. to evade this tax would really be a discrimination against people doing business within the city of New York with storehouses or mills there. Besides, if such sales were to go untaxed, a door would be open for an evasion, unfair indeed to those who did not care to resort to such methods. Merchandise could be stored or kept outside the State and sold by sample within the State, without paying a tax. Not every merchant can afford such storehouses. No principle of interstate commerce forces us to such a conclusion. "Even interstate business must pay its way." (*Postal-Telegraph Cable Co.* v. *City of Richmond*, 249 U. S. 252, 259).

The counsel have relied upon *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). The sales there were made and consummated in Ohio where the company

approved, accepted and executed the orders or sales. To the same effect was *Matter of West Publishing Co.* v. *Taylor* (276 N. Y. 535). The reasons and principles here expressed find their source, or, rather, their support, in such cases as *Adams Manufacturing Co.* v. *Storen* (304 U. S. 307); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (303 U. S. 604); *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250); *Henneford* v. *Mason Co.* (300 U. S. 577); *Wiloil Corp.* v. *Pennsylvania* (294 U. S. 169); *Monamotor Oil Co.* v. *Johnson* (292 U. S. 86); *Banker Brothers Co.* v. *Commonwealth of Pennsylvania* (222 U. S. 210).

The order should be affirmed, with costs.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur.

Order affirmed.